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Office of Professional Responsibility

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SUMMARY OF THE INVESTIGATION BY THE OFFICE
OF PROFESSIONAL RESPONSIBILITY INTO THE CONDUCT
OF ASSISTANT UNITED STATES ATTORNEY ERIC SWENSON
IN UNITED STATES v. LEUNG TAK LUN (THE "GOLDFISH CASE")

INTRODUCTION AND SUMMARY

The Goldfish Case involved efforts by three sovereigns -- the United States (U.S.), the People's Republic of China (PRC or China), and Hong Kong -- to investigate and prosecute several persons implicated in a scheme to smuggle heroin from Shanghai to San Francisco. The first U.S. prosecution ended on February 13, 1990, when United States District Court Judge William Orrick declared a mistrial after the principal witness for the prosecution -- Wang Zong Xiao (Wang), a PRC national -- claimed that portions of his testimony had been coerced by PRC law enforcement officers. The defendants subsequently pleaded guilty to lesser charges.

In the midst of trial Wang filed an asylum petition alleging that he had been tortured in PRC prisons. Wang also filed a civil suit against the Attorney General of the United States and various federal officials. Judge Orrick presided over the civil trial. On October 6, 1993, Judge Orrick dismissed most of Wang's claims on jurisdictional grounds but entered an order permanently enjoining the United States from removing Wang from the United States or returning him to the PRC. Judge Orrick's decision criticizes harshly Assistant United States Attorney (AUSA) Eric Swenson's

handling of the criminal case and his candor in the civil case. Judge Orrick's ruling is currently on appeal to the United States Court of Appeals for the Ninth Circuit.

The Office of Professional Responsibility (OPR) investigated Judge Orrick's criticisms of AUSA Swenson. OPR concluded that AUSA Swenson did not engage in any intentional misconduct. OPR also concluded, however, that AUSA Swenson used poor judgment in relying solely on his agents to obtain all statements made by Wang to the Chinese police because AUSA Swenson was specifically aware of various leads indicating that Wang had made several statements -- some of which were videotaped -- to the Chinese police that the U.S. prosecution team had not obtained (and thus had not disclosed to the defense). OPR concluded further that AUSA Swenson acted in reckless disregard of his obligation to comply with the Brady doctrine by failing to disclose to defense counsel the existence of a videotape (and of a memorandum discussing that videotape) of an interrogation of Wang that may have shown physical injury resulting from coercion. Finally, OPR concluded that AUSA Swenson acted in reckless disregard of his obligation to be candid with the court by making several inaccurate representations to the court relating to his discovery efforts.

OPR's investigation did not substantiate the remainder of Judge Orrick's criticisms.

I. THE FACTUAL BACKGROUND

A. The Goldfish Smuggling Conspiracy

In December, 1987, Leung Tak Lun (Leung) conceived a plan to smuggle heroin from China to the United States. The plan entailed packaging powdered heroin into condoms, inserting the condoms into the bellies of dead goldfish, resealing the goldfish with glue, and mixing the stuffed goldfish with live goldfish being exported to the United States. Leung enlisted Wang for assistance.

Wang has given several different versions of the heroin delivery and of the subsequent events. In one version, two persons sent by Leung delivered the heroin to Wang at the factory where Wang worked. Wang then went to his room at the YMCA to package the heroin and conceal it in the dead goldfish. In a second version, Wang and Leung met the two persons, and a man called "Ah Kun," at the Oriental Hotel in Guangzhou to discuss the delivery. A few days later, the two men delivered the heroin to Wang at the factory and Wang packaged and concealed the heroin. In a third version, Leung accompanied Wang to the Oriental Hotel where they received the heroin from the two men and "Ah Kun." Leung paid \$460,000 Hong Kong dollars (then equivalent to @ \$54,000 U.S. dollars) to the two men and promised to pay more when he returned to Hong Kong. Leung and Wang took a taxi to a third person's house and reduced the heroin bricks to powder with a hammer. Wang later packaged and concealed the heroin.

In the course of stuffing the goldfish with heroin, Wang exhausted his supply of the glue used to reseal the goldfish.

Consequently, several of the goldfish had to be patched together with needle and thread. This proved to be the conspirators' undoing. Chinese authorities, after finding an unusually large number of dead goldfish in the shipment, noticed that several of the dead fish had stitch marks. Closer inspection revealed that the dead goldfish contained packets of heroin.

Law enforcement officials in the U.S., the PRC, and Hong Kong cooperated in staging a controlled delivery of the heroin shipment to San Francisco. The delivery occurred on March 10, 1988, and was followed by the arrests of several persons in each of those jurisdictions.

B. Prison Abuse / Wang's Interrogation Statements

Wang was arrested in Shanghai on March 12, 1988. Wang alleges that four plainclothes policemen dragged him off the street into a waiting car and kicked him repeatedly during the short drive to the Changning Branch of the Shanghai Public Security Bureau.^{1/} Wang alleges further that he was mistreated at the Changning Branch and at the No. 1 Detention House in Shanghai. Wang clarified, however, that the alleged mistreatment was allocated randomly among the many prisoners and was not perpetrated as a reprisal for failing to adopt scripted testimony.

^{1/} The facts concerning Wang's treatment by PRC law enforcement officials are taken from his deposition testimony in the civil case. Judge Orrick credited Wang's testimony, although it should be noted that Judge Orrick repeatedly questioned Wang's veracity during the criminal trial. See, e.g., 2/13/90 Tr. 1314 (referring to Wang's "perjured testimony"); 2/13/90 Tr. 1316 (Wang's testimony "False in one, false in all"); 2/14/90 Tr. 1439 ("You can't tell whether what [Wang] says is the truth").

C. Hong Kong Declines to Prosecute Leung

Hong Kong police officers arrested Leung in March, 1988. The PRC urged Hong Kong to prosecute Leung and provided evidence -- including written statements of Wang and a videotape of one of Wang's interrogation sessions -- to Hong Kong officials. Hong Kong prosecutors, however, declined to bring charges against Leung.

A memorandum by Crown Counsel Bruce McNair, dated March 28, 1988, (the "McNair memorandum") details the reasons for the declination. The McNair memorandum noted that Wang had "made a full 'confession'" but cautioned that the confessions were made "under blatant inducement" by the PRC. The asserted "inducement" is not identified, but earlier in the memo the author states that Wang's incentive to cooperate with PRC police is to save himself from the death penalty. The McNair memorandum stresses the difficulty of basing a case on the "uncorroborated evidence of a coconspirator" because such evidence is subject to evidentiary limitations in Hong Kong courts. The memorandum offered one additional observation:

I am unaware of the methods or circumstances surrounding the taking of W[ANG]'s confessions, however, a video tape has been supplied (and viewed by) Inspector Boucher, who tells me that a most peculiar posture was adopted by W[ANG] throughout the confession, whereby the whole of his left side and left arm was hidden from the camera, as if his left arm and side may have suffered some injury. (Emphasis added).

On March 31, 1988, Deputy Crown Prosecutor J.P. Chandler memorialized discussions he had with McNair and others concerning the Leung prosecution. Chandler shared McNair's view that a

prosecution based on the uncorroborated statements of an accomplice "testifying as a result of the greatest possible inducement would almost inevitably lead to an acquittal." The Chandler memorandum does not mention the possibility of coercive interrogations. On April 6, 1988, J.K. Findlay, the Director of Public Prosecutions, sent a memorandum to Chandler agreeing that "the chances of obtaining a conviction against Leung are too low to justify a prosecution [and] too low to justify an entry into the political and diplomatic horror involved in getting W[ang] to Hong Kong.

D. The United States' Investigation Commences

1. The Interrogation Minutes

The principal figures in the U.S. prosecution team were AUSA Swenson, Special Agent (SA) of the Drug Enforcement Administration (DEA), and DEA Country Attache (CA) At some point after the controlled delivery on March 10, 1988, but before the end of the month, AUSA Swenson and SA learned that Wang had been arrested in the PRC. b7C

In late March, 1988, Hong Kong Inspector Sandy Boucher provided the DEA with eleven separate "interrogation minutes," summaries of statements given by suspects to the PRC police. Three of the interrogation minutes recorded statements Wang made to the PRC police regarding the heroin conspiracy. One of the interrogation minutes is dated March 14, 1988, and contains the version in which Leung arranged to have the two men deliver the heroin to Wang at the factory. AUSA Swenson annotated his copy of the statement, writing "Leung not there" in the margin (emphasis in original).

The other two interrogation minutes are dated March 19, 1988, and contain the version in which Leung and Wang received the heroin at the Oriental Hotel and then worked together to break the bricks of heroin down to powder. The minutes for the interrogation session commencing at 1:00 p.m. contains the following exchange:

Question: As to the particular section of the "Criminal Law" which you are guilty and the criteria governing the leniency or strictness with which this case is to be handled, you should know much about them after so many interrogations have been conducted on you. (Emphasis added). * * *

Answer: I deeply believe in the provisions of the "Criminal Law". I am very grateful to the comrades who handle this case, for the lessons they have taught me.

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AUSA Swenson and SA . noted that the March 19 statement placed Leung at the scene of the heroin delivery, whereas the March 14 statement did not. The reference to multiple interrogations did not cause either AUSA Swenson or SA to ask if PRC or Hong Kong officials had additional statements from Wang.

2. SA . Ponders "Unconventional" Interrogation Techniques

SA testified that, in late April or early May of 1988, he considered the possibility that the changes in Wang's statements concerning Leung's presence at the scene of the heroin delivery could have resulted from "unconventional" interrogation techniques, such as physical force and electric shocks. SA shared his supposition with AUSA Swenson. . did not have any information that Wang had been mistreated; rather, he merely speculated that Wang may have been mistreated because he had read that mistreatment of prisoners is common in the PRC. AUSA Swenson acknowledged SA

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- 8 -

: conjecture, but he did not raise the issue with his supervisors at the United States Attorney's Office (USAO).

3. Contacts with the PRC

Additional investigation by DEA led to the decision that charges should be brought in the Northern District of California against a number of individuals involved in the heroin smuggling scheme. One of the potential defendants was Leung, the alleged architect of the smuggling conspiracy. Wang's statements were considered to be an important part of the evidence against Leung.

On April 28, 1988, SA received a cable from the Narcotics Coordinator in the American Embassy in Beijing. The cable stated that:

* * * under Chinese law, defendants in China -- once handed over to the courts -- were beyond the jurisdiction of the public security units. Liu said that, as things stand now, Wang Zong Xiao and the other six defendants are scheduled to be transferred to the court system sometime in mid-May [1988]. He implied that their transfer could be postponed if the [Ministry of Public Security] is requested to facilitate contact between U.S. authorities and the defendants.

The United States never formally requested that the PRC delay transferring Wang to the court system. Rather, the PRC appears to have acted unilaterally in delaying the prosecution of Wang in China until after the U.S. trial.

E. The May 1988 Trip to Hong Kong, Beijing, and Shanghai

1. Meetings with Hong Kong Officials

On May 12, 1988, AUSA Swenson and SA traveled to Hong Kong to review evidence obtained by the Hong Kong police. They met in Inspector Boucher's office and S/ interviewed Chico Wong, a co-

b7C

- 9 -

conspirator. Later, AUSA Swenson met with Inspector Boucher to discuss the evidence in the heroin smuggling conspiracy. Inspector Boucher told AUSA Swenson that he had a videotape related to the investigation and that Wang appeared on the videotape. AUSA Swenson did not ask to see the videotape or to obtain a copy of it, nor did he inform SA [redacted] that such a videotape existed. AUSA Swenson assumed that it was the same videotape referred to in a March 17, 1988 Department of State cable stating that the PRC had a videotape of the discovery of the heroin in Shanghai that also showed three of six detained suspects. AUSA Swenson did not ask Hong Kong officials why they declined to prosecute Leung.

At some time in late March or early April, 1988, Inspector Boucher informed CA [redacted] of a videotape depicting one of the interrogations of Wang in the PRC. CA [redacted] actually saw approximately five minutes of the videotape when he entered a room at the Hong Kong police department in which the videotape was being shown. CA [redacted] testified that one of Wang's arms was not visible and that a police officer kept his hands on Wang during the questioning. CA [redacted] testified that the videotape did not interest him at the time and that he did not mention it to AUSA Swenson.

2. Meeting in Beijing

On May 17, 1988, AUSA Swenson, SA [redacted] and CA [redacted] met in Beijing with PRC officials from the Ministry of Public Security (MPS). AUSA Swenson raised the issue of bringing Wang to the United States to testify against Leung. PRC officials indicated that they would consider honoring the request.

b7C

- 10 -

3. Interview of Wang in Shanghai

On May 19, 1988, AUSA Swenson, SA and CA interviewed Wang at the No. 1 Detention Center in Shanghai. SA posed most of the questions and he drafted a "DEA-6" form detailing the interview. Wang appeared willing to cooperate and his statements were corroborated by other evidence.

AUSA Swenson and SA were aware that Wang's statements differed with respect to placing Leung at the scene of the heroin delivery, but they decided not to ask him about those differences. AUSA Swenson stated that he did not ask about the discrepancy because he had concluded that Wang's March 14 version was not true. The March 14 version stated that two unknown men (acting at Leung's behest) delivered a substantial amount of heroin to Wang, whom they had never before met. AUSA Swenson's many years of prosecuting narcotics cases taught him that major drug deals are not consummated between complete strangers. Thus, Wang's March 19 version in which Leung personally received the heroin (with Wang) and paid for it seemed more logical. AUSA Swenson attributed the change in Wang's testimony to the fact that suspects generally do not tell the entire story of their criminal activity in their first interviews; rather, they conceal facts to protect their confederates or to elicit promises of leniency for cooperation.

It is worth noting that SA's DEA-6 stated that Leung paid for the heroin. That statement is consistent with the March 19 version of the drug transaction, in which Leung paid \$460,000 HK to the two men who delivered the heroin. The DEA-6 refers to a

b7C

- 11 -

payment of \$50,000.00 HK, but the reference to Hong Kong dollars may be a mistake (\$460,000 HK was equivalent at that time to \$50,000 in U.S. currency).

At the end of the interview Wang was asked if he would be willing to come to the United States to testify. Wang, through an interpreter who worked for the Ministry of Public Security, stated that he would. He also nodded his head to indicate his assent.

Neither AUSA Swenson nor SA . . . asked Wang during the interview whether he had been mistreated in custody or whether his statements had been coerced. AUSA Swenson explained that he did not raise those topics because Wang appeared to be in good physical shape, the relationship between Wang and the PRC law enforcement personnel appeared to be friendly, and the March 19 version appeared to be more accurate than the March 14 version. Because those considerations dispelled his and SA . . . prior speculation about possible mistreatment Wang may have suffered, AUSA Swenson believed that it would be insulting to the PRC officials for such issues to be raised. He also feared that Chinese resentment of such questions could jeopardize the PRC's cooperation in the case.

While AUSA Swenson was in Shanghai he received from PRC officials a videotape that he was told related to the investigation. The tape depicted the discovery of the heroin-stuffed goldfish by Chinese police. AUSA Swenson knew of that videotape before his trip to Hong Kong, and he had assumed that it was the same videotape to which Inspector Boucher had referred.

F. Wang's September 1988 Trip to San Francisco

On July 22, 1988, the USAO in San Francisco filed a superseding indictment against, among others, Leung and Chico Wong. Leung was in the custody of the Hong Kong police so AUSA Swenson began efforts to extradite Leung to the United States. AUSA Swenson thought that an affidavit from Wang would facilitate the extradition. On August 2, 1988, AUSA Swenson sent a draft affidavit based on Wang's statements to Senior Assistant Crown Counsel Cahill. The affidavit contained Wang's March 19 version of events, which placed Leung at the scene of the heroin delivery and portrays him and Wang grinding the heroin bricks into powder.

Cahill discussed the draft affidavit with CA . During that discussion, Cahill mentioned a videotape of one of the Wang's interrogations that had been translated into a written interrogation statement. CA neither inquired about the videotape nor informed AUSA Swenson of the matter.

AUSA Swenson determined that Wang's affidavit would be more effective if it were executed in the United States rather than before a consular official in the PRC. Negotiations and formal diplomatic activity resulted in the PRC granting permission for Wang to travel to the United States.

Transporting to the United States a Chinese national who was also a criminal suspect posed some novel issues that required the involvement of the American Embassy in Beijing. A September 2, 1988 cable from the Department of State to the American Embassy in Beijing raised the possibility that Wang might apply for asylum:

5. FYI: One additional concern is that the Chinese witnesses might seek asylum upon arrival or while in the U.S. It is very unlikely that an asylum request would succeed, but it could conceivably delay the witnesses['] return to China. Embassy may at its discretion wish to mention this concern to PRC officials. If you do so please advise.

Personnel at the American Embassy in Beijing discussed the issue but made a discretionary decision not to raise it with PRC officials. On September 8, 1988, the American Embassy advised the DEA that the issue would not be raised: "we believe that the Chinese might decide against sending [the witnesses]" if they focused on the possibility of asylum petitions. AUSA Swenson had no role in that decision.

On September 19, 1988, Wang arrived in San Francisco accompanied by several PRC officials. He arrived under immigration "parole," a legal fiction that permits ingress without conceding official legal "entry." AUSA Swenson met with Wang on September 19 and 20 to finalize Wang's affidavit for use in the extradition proceedings. The affidavit Wang executed placed Leung at the delivery of the heroin in Shanghai and at the location where the heroin was reduced to powder. Wang swore under oath before Magistrate Judge Langford that the affidavit was true and accurate.

Wang and his PRC escorts then returned to AUSA Swenson's office. The PRC officials left the office briefly, leaving AUSA Swenson and Wang alone with a U.S. interpreter. Through the interpreter, Wang asked AUSA Swenson if he could help Wang avoid the death penalty in the PRC. AUSA Swenson responded that he believed Wang's cooperation with the United States would result in leniency

for Wang. At no time during this conversation outside the presence of the PRC escorts did Wang communicate to AUSA Swenson that he had been mistreated by the PRC authorities, that the contents of his affidavit were untruthful or inaccurate, or that he had been given any instructions by PRC authorities about his testimony.

G. AUSA Swenson's Discovery Efforts

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On February 17, 1989, AUSA Swenson enlisted CA aid in gaining from PRC officials information about the cooperating witnesses. AUSA Swenson stated that he needed to know:

what promises have been made to [the witnesses] for their cooperation. This may be a sensitive area but we need to impress upon the Chinese that, under American law, this is the type of information that the prosecution is required to provide to the defendants' lawyers. Also, the defense lawyers have indicated that they will be asking the court to order the United States to provide copies of any other written, or tape-recorded (including videotapes), interrogation or interviews of the defendant witnesses. * * * Perhaps this is an issue that you could explore with the Shanghai MPS before our [March 1989] visit.

On March 1, 1989, the DEA cabled the American Embassy in Beijing and reiterated that any promises given by the PRC to the Chinese witnesses (including Wang) and any "written or tape recording (including videotapes) [of] interrogation or interviews" of the witnesses had to be produced to defense counsel. On March 3, 1989, AUSA Swenson filed a memorandum in U.S. District Court stating that the United States would "make a good faith effort to inquire of the [PRC] * * * whether or not there exists any other Jencks Act material of the two witnesses in question [including Wang],

b7C

- 15 -

including any video- or audio-recordings of their actual oral statements in Chinese."

Shortly before he traveled to Shanghai in early March, 1989, AUSA Swenson telephoned CA to follow up on the February 17, 1989 letter and to fulfill his promise to inquire about Jencks Act material. AUSA Swenson asked CA if there were additional interrogation minutes or other materials. CA , who had viewed part of the videotape of a Wang interrogation, told AUSA Swenson: "we got it all" already.

H. The March 1989 Trip to Hong Kong and Shanghai

1. Trip to Hong Kong / Second Interview of Wang in Shanghai

On March 6, 1989, AUSA Swenson met with DEA Special Agent in Hong Kong to review information relating to Inspector Boucher's anticipated testimony at the criminal trial. On March 7, 1989, AUSA Swenson and CA met with several PRC law enforcement officials in Shanghai to review in detail the investigatory steps taken in the PRC. The purpose of the meeting was to identify specific documents and witnesses to be used at the upcoming trial.

The following morning AUSA Swenson met with PRC officials and Wang to conduct a pre-trial interview session. AUSA Swenson noted that Wang would probably be cross-examined about the death penalty he could face in the PRC and about any promises of leniency that he might have received in exchange for his testimony. AUSA Swenson also stated that he anticipated the defense would ask Wang about his post-arrest treatment and about prison conditions in the PRC. AUSA Swenson stated further that the defense would probe the

inconsistencies in the interrogation minutes concerning Leung's presence at the heroin delivery.

That afternoon AUSA Swenson met again with the PRC law enforcement officials. AUSA Swenson explained to the PRC officials the process of cross-examination in U.S. courts and he focused on efforts defense counsel might make to discredit witnesses. He also provided to the officials who would testify examples of the questions defense counsel might pose. The PRC officials requested that AUSA Swenson draft a list of topics on which the witnesses would likely be examined. AUSA Swenson agreed to do so.

2. Return to Hong Kong / AUSA Swenson receives McNair Memo

AUSA Swenson returned to Hong Kong on March 10, 1989. He met with Inspector Boucher to discuss further the documentary evidence and Boucher's testimony. Before AUSA Swenson left Hong Kong, Inspector Boucher handed him a stack of documents relating to the Leung prosecution. Included in that stack were copies of the McNair, Chandler, and Findlay memoranda discussing Hong Kong's decision not to prosecute Leung for heroin smuggling. Inspector Boucher told AUSA Swenson that those memoranda were confidential documents that he himself should not have, but that they might be of interest to AUSA Swenson.

AUSA Swenson read the memoranda on his flight back to San Francisco. The McNair memo discusses a videotaped interrogation of Wang and speculates that the camera angle may have been staged to disguise possible mistreatment of Wang that caused Wang's "most peculiar posture." AUSA Swenson did not mention the memoranda to

- 17 -

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On April 3, 1989, AUSA Swenson sent to CA a 16-page, single-spaced list of questions that the Chinese witnesses could expect to encounter at the Leung trial and asked CA to forward the list to the Chinese witnesses via the American Embassy in Beijing. The list included the following entry:

Witness Zhu Yi-Zong

Since Mr. Zhu was the officer who arrested Wang Zong-Xiao and first interviewed him, I anticipate that Mr. Zhu will be extensively cross-examined regarding the treatment given Wang Zong-Xiao [and] any promises or threats given to him. (Emphasis added).

AUSA Swenson advised further that "Mr. Zhu should be completely candid in his response to any such questions."

I. The Tiananmen Square Massacre

In June, 1989, prodemocracy demonstrations occurred in China. The demonstrations were crushed in a massive and bloody crackdown by PRC authorities that came to be known as the Tiananmen Square Massacre. The crackdown sparked world-wide condemnation of human rights abuses in China and resulted in thousands of arrests and detentions of prodemocracy persons, many of whom were detained in the same prison in which Wang was held.

J. Defense Counsel Travel to Hong Kong and the PRC

In March of 1989, defense counsel for Leung, Chico Wong, and another defendant traveled to Hong Kong to interview witnesses and

obtain evidence. The Hong Kong police denied their requests for evidence and records. The attorneys then flew to Shanghai but again met with official resistance. Upon returning to San Francisco, defense counsel moved the U.S. District Court for an order permitting them to depose Chinese citizens in China. Judge Orrick granted the motion. AUSA Swenson then wrote to the American Embassy in Beijing to request that the PRC make witnesses available to defense counsel. The PRC agreed to do so.

Defense counsel returned to the PRC in September, 1989. They were met by Yuan You Gen (Yuan), Vice Chief of the Shanghai Public Security Bureau. AUSA Swenson was also present for the interviews. Yuan told defense counsel that they could only ask questions relating to the Goldfish Case and could not "ask a lot of roving questions about the Chinese government." Yuan may have meant that he did not want any questions that implicated the crackdown at Tiananmen Square or the detention or treatment of the jailed democracy protesters. Defense counsel, however, assumed that they were not to ask about Wang's post-arrest treatment or his prison conditions.

The defense counsel interviewed Wang and three civilian witnesses. They complained later that their interviews were hampered by the fact that they brought an interpreter who spoke Mandarin but not the Shanghainese that Wang and the witnesses spoke. Consequently, Yuan had to serve as the interpreter.

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K. Wang is Paroled into the United States to Testify

In late November or early December, 1989, the United States made a formal request to the PRC to have the Chinese witnesses, including Wang, brought to San Francisco. The request was approved in Beijing on December 8, 1989.

Wang arrived in San Francisco on December 27, 1989, pursuant to 8 U.S.C. § 1182(d)(5)(A).²⁷ He was accompanied by four representatives of the PRC's Public Security Bureau and one official of the Ministry of Public Security. Most of those officials were also scheduled to testify in the criminal trial. Wang was paroled into the United States until January 26, 1990, a parole that was subsequently extended until February 9, 1990.

Wang met with AUSA Swenson in late December, 1989, to discuss in more detail the trial processes in the United States. AUSA Swenson advised Wang that defense counsel wished to interview him. AUSA Swenson informed Wang that he could discuss the case with defense counsel but that he had no obligation to do so.

²⁷ Section 1182(d)(5)(A) provides: "The Attorney General may * * * in [her] discretion parole into the United States temporarily under such conditions as [she] may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien * * * but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith be returned to the custody from which he was paroled * * *."

II. THE LEUNG PROSECUTION

A. Defense Counsel Interview Wang

The Leung prosecution commenced on January 8, 1990. The following day, defense counsel interviewed Wang in AUSA Swenson's office. Yuan and another PRC official (Wang Qianrong), acting as an interpreter were also present. When asked whether PRC police had struck or otherwise harmed him, Wang responded "no". Wang also told defense counsel that he had been interrogated at length on the day of his arrest, that he had been interrogated many times subsequent to that day, and that PRC officials took notes at each interrogation. Thus, it became clear that Wang had given many statements to the PRC that had not been made available to either the U.S. prosecutors or defense counsel. Defense counsel asked AUSA Swenson to obtain copies of the additional statements. AUSA Swenson promptly requested the statements, had them translated and provided them to the defense.

B. Wang's Additional Prior Statements

The earliest dated statement was taken on March 12, 1988, the day Wang was arrested. Wang related that Leung arranged for two unknown men to deliver the heroin to Wang. This account is similar to the previously disclosed March 14, 1988 version that does not place Leung at the scene of the delivery. A statement dated March 13, 1988 also provides that two unknown men delivered the heroin to Wang at the factory.

On March 15, 1988, Wang changed his account of the heroin delivery. In this version of the events, the two unknown men

deliver the heroin to Wang and Leung at the Oriental Hotel. Leung traveled to Guangzhou to receive the heroin with Wang precisely because Wang did not know the deliverymen. Leung paid the men and he and Wang crushed the heroin bricks to powder with a hammer. All of the other statements, including the comprehensive April 21, 1988 statement, coincided with this version of the delivery.

C. Inspector Boucher Testifies

On January 17, 1990, AUSA Swenson called Inspector Boucher of the Hong Kong police to testify. During cross-examination the next day, Inspector Boucher stated that the PRC had provided him with a videotape depicting an interrogation of Wang. The following trial day, January 29, 1988, defense counsel asked the court to order the prosecution to obtain and produce all PRC witness statements, including any videotapes. AUSA Swenson, who had read (one year earlier) the McNair memorandum's reference to a videotaped interrogation of Wang, stated to the court: "I don't know about any video."

D. Wang Asks the Court for Protection

On January 30, 1990, Wang took the stand as a witness. After stating his name, age, and country of residence, Wang asked if he could "make a personal request to the Judge." Judge Orrick decided to "indulge" Wang and excused the jury. Wang expressed his concern that, although "the extent of the crime committed by myself and by L[eung] is the same in seriousness," Wang faced the death penalty in China whereas Leung faced less grave consequences in the United States. Wang then requested "that the Court in America safeguard

me." Judge Orrick responded that Wang had "the protection of the United States government and of this Court" and assured Wang that he would be treated "absolutely fairly." At the suggestion of defense counsel, Judge Orrick asked Wang if he would like to have an "American lawyer * * * to represent him here in court, and help him as he can while he's here in the United States." Wang responded affirmatively. Judge Orrick decided to appoint Cedric Chao, a partner at Morrison & Foerster.

E. AUSA Swenson Interviews Wang in his Office

On January 30, 1988, fifteen minutes after the court recessed for the day, AUSA Swenson directed the Marshal's Service to bring Wang to his office. Yuan and the PRC interpreter were also present in AUSA Swenson's office, as were SA [redacted] and CA [redacted]. At the beginning of the meeting, Yuan spoke sternly to Wang for approximately fifteen minutes. The Americans present could not understand what Yuan said because he spoke in Shanghainese. Wang has testified subsequently that Yuan told him that an American judge could not protect him in China and instructed him to tell Judge Orrick that he did not want an attorney.

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AUSA Swenson asserts that he told Wang that a court-appointed lawyer would not be able to address Wang's concerns about his sentence in China as effectively as could AUSA Swenson. AUSA Swenson stated that he was in a better position to request leniency from the PRC authorities because he could represent on behalf of the United States government the degree of cooperation Wang had shown in the Leung prosecution. Wang alleges, however, that AUSA

Swenson told him that he did not need a court-appointed lawyer because "I am your attorney," "I can represent you." AUSA Swenson denies making such a declaration to Wang.

OPR credited AUSA Swenson's account of his statement to Wang. First, his account accords with his earlier statement to Judge Orrick that he would be able to request leniency for Wang from PRC officials. Second, Wang's testimony on this point is somewhat confused and focuses on AUSA Swenson's stated willingness to seek leniency from the PRC. His election that AUSA Swenson said "I am your attorney" reads more as a summary of AUSA Swenson's ability to help Wang than as a recalled quotation. Thus, OPR concluded that AUSA Swenson did tell Wang that he could effectively assist Wang's bid for leniency but did not tell Wang "I am your lawyer."

F. Wang Testifies at the Leung Trial

On February 1, 1990, two days after he received court-appointed counsel, Wang testified again in the Leung case. Wang stated that Leung accompanied him to the Oriental Hotel to receive the heroin. Wang also stated that he could "remember the truth" better if he could review "a very detailed statement" he made on April 21, 1988. Neither the prosecution nor defense counsel had yet received a copy of that statement.

The following day, AUSA Swenson obtained a copy (in Chinese) of the April 21, 1988 statement and forwarded it to defense counsel. At the start of the next trial day, February 5, 1990, defense counsel complained to the court that the prosecution had engaged in a "pattern" of concealing until the last minute

important documents that should have been disclosed earlier to the defense. AUSA Swenson replied that "it just didn't occur to us that there may be additional statements" because "[the three that we had] seemed to cover all of the subject matter."

After that discussion Wang met privately with his counsel. He then took the witness stand to resume his direct testimony. By then, defense counsel had received translated copies of the April 21, 1988 statement and of the other interrogation minutes. Wang again testified that Leung accompanied him to the heroin delivery and that Leung participated in crushing the heroin into powder.

Later that afternoon, Wang's attorneys filed a petition for political asylum in the United States. The petition included an affidavit from Wang alleging that he had been beaten and electrically shocked while in prison in the PRC.

G. Communications With INS Personnel

At some point on February 5, 1990, AUSA Swenson received a telephone call from an asylum examiner for the INS, b7C informing him that Wang had filed for political asylum. AUSA Swenson mentioned that 18 U.S.C. § 3508 might preclude Wang's asylum petition. Section 3508 provides that persons in the custody of a foreign country who are transferred to the United States for the purpose of giving testimony "shall be returned to the country

b7C

- 25 -

from which he is transferred" and that the return shall not require "proceedings under the immigration laws."^{3/}

AUSA Swenson also spoke with Assistant District Director for Examinations.

I asked AUSA Swenson what he knew about Wang; he told her that Wang was a witness in a drug prosecution and had admitted to smuggling heroin, and that he had no knowledge that Wang was involved in any political movement.

interviewed Wang on February 6, 1990. That same day, the Department of State sent a cable to the American Embassy in Beijing stating that "INS is confident it will find Wang ineligible for asylum under U.S. law * * *." That assessment was apparently based on the fact that criminal aliens were by law ineligible at that time to obtain asylum. On July 29, 1991, the INS District Director denied Wang's asylum petition citing Wang's criminal activities as the reason for denial.

H. AUSA Swenson Meets Again with Wang

On February 6, 1990, the day after Wang filed for political asylum, Judge Orrick authorized AUSA Swenson to ask Wang for a private meeting. AUSA Swenson arrived at the Marshals Service office where he was approached by Wang's counsel, who demanded to be present when AUSA Swenson asked Wang if he would meet with him,

^{3/} AUSA Swenson stated in a sworn declaration dated September 31, 1990, that he had no knowledge of Section 3508 until he learned of it on February 6, 1990, in a conversation with Tom Snow, an attorney at the Department of Justice. During his testimony in Wang's civil case, however, AUSA Swenson stated that his declaration was incorrect, and that his discussion with Snow regarding Section 3508 occurred on February 1 or 2, 1988.

AUSA Swenson, alone. AUSA Swenson did not acquiesce to the demand. Wang indicated that he was willing to meet alone with AUSA Swenson (and a U.S. interpreter).

Wang told AUSA Swenson that the testimony he gave on February 1 and February 5 -- placing Leung at the scene of the heroin delivery -- was truthful.

I. PRC Officials Leave United States

On February 9, 1990, counsel for Leung wrote to AUSA Swenson expressing concern that the PRC officials who had testified in the Leung prosecution might be recalled to China and requesting AUSA Swenson to keep them in the U.S. so they could be called to testify in light of Wang's allegations of mistreatment. AUSA Swenson spoke with Leung's counsel later that afternoon and told him that some of the PRC officials had already returned to China, and that he believed Yuan and the interpreter (Wang Qianrong) had already left.

AUSA Swenson contacted the Chinese Consulate later that day to see if Yuan and the interpreter were there, but he was told that they had left. AUSA Swenson called again two days later to check again and was told that they had left for China that same morning.

J. Judge Orrick Declares a Mistrial

On February 13, 1990, Wang again took the witness stand. Wang again affirmed that his testimony of February 1 and February 5 was truthful. Wang then proceeded, however, to recount a hybrid version of the heroin delivery that contradicted both his March 12-14, 1988 statements (Leung not at scene of delivery) and his March 19 and April 21, 1988 statements (Leung present at delivery). For

the first time, Wang testified that he and Leung met the two delivery persons at the Oriental Hotel several days before the actual delivery and that Leung gave the two men some money. The men delivered the heroin to Wang at the factory several days later. Wang also stated that Leung was not present when the heroin was reduced to powder.

Defense counsel moved for a mistrial based on Wang's apparent perjury and the possible coercion of his testimony. Counsel for Chico Wong cited Wang's "suggestibility[,] [t]hat is, his willingness to do and say whatever appears to be in his interest at the time[,] * * * to perjure himself where it appears to be necessary." Counsel for Leung, citing Wang's repeated perjury, noted that Wang "lies when he feels he has to." Judge Orrick agreed with defense counsel, finding that Wang had offered so many different lies that it would be impossible for the jury to know which parts of his testimony to believe: "False in one, false in all."

Leung and his co-defendants moved subsequently to dismiss the indictments, arguing prosecutorial misconduct and double jeopardy grounds. Judge Orrick denied the motion and the United States Court of Appeals for the Ninth Circuit affirmed the denial. United States v. Leung Tak Lun, 944 F.2d 642 (9th Cir. 1991). Shortly after the Ninth Circuit's ruling Leung and the other co-defendants pleaded guilty to various charges stemming from the heroin smuggling conspiracy.

III. THE CIVIL LAWSUIT

On February 5, 1990, Wang filed a civil complaint seeking declaratory and injunctive relief, alleging that the U.S. government committed a variety of constitutional violations in the course of the Leung case. Judge Orrick granted a preliminary injunction on February 10, 1990, restraining the U.S. government from returning Wang to the PRC or to the custody of PRC officials.

A. Judge Orrick Grants Further Injunctive Relief

On February 18, 1992, the INS terminated Wang's immigration parole and commenced exclusion proceedings. The same day, Wang requested a hearing on his Motion for Partial Summary Judgment on his eleventh cause of action, which alleged that the U.S. government had no "legal authority over [Wang's] person" and thus could not return him to PRC custody. On February 20, 1992, Judge Orrick granted Wang a preliminary injunction preventing the U.S. government from moving forward with exclusion or deportation proceedings until Judge Orrick ruled on Wang's motion for partial summary judgment. Four months later, Judge Orrick granted Wang summary judgment on the eleventh cause of action. Judge Orrick's ruling was based on the court's interpretation of the Immigration and Nationality Act and on his "inherent supervisory powers [as a federal judge] to protect witnesses appearing before [the District Court]."¹ The United States appealed both the preliminary injunction and the grant of summary judgment.

B. The Ninth Circuit Reverses Judge Orrick

The Ninth Circuit vacated the preliminary injunction, reversed the grant of summary judgment, and remanded the case with instructions to dismiss Wang's eleventh cause of action. Xiao v. Barr, 979 F.2d 151 (9th Cir. 1992). The Ninth Circuit held that Judge Orrick lacked jurisdiction to preempt the INS proceedings before Wang had exhausted the administrative remedies available to him under the immigration laws. Id. at 154-155. The court rejected Judge Orrick's reliance on his "inherent supervisory powers," holding that such powers could not operate "in derogation of the exhaustion requirement" of the immigration laws. Id. at 155-156.

C. Judge Orrick Enters Permanent Injunction

On October 6, 1993, Judge Orrick entered a 131-page Opinion and Order in Wang's civil suit. He found that "clear, flagrant, and shameful violations of Wang's rights under the Constitution" "'shock[ed] the conscience' of the Court and den[ied] Wang the due process to which he is entitled." Judge Orrick again found that the facts "warrant[ed] the exercise of the Court's inherent supervisory power to protect the witnesses appearing before it." Judge Orrick granted Wang summary judgment on two causes of action and entered a permanent injunction prohibiting the United States government "from taking any action in furtherance of removing [Wang] from the jurisdiction of the United States or of returning him to the custody of the People's Republic of China or any of its representatives." Judge Orrick granted summary judgment to the United States on the remaining causes of action.

The United States has appealed Judge Orrick's Order. The case was argued before a panel of the Ninth Circuit in July, 1995, and is currently under advisement.

Judge Orrick's Opinion and Order is replete with harsh criticisms of AUSA Swenson's conduct in the Leung prosecution. The Opinion starts with the premise that AUSA Swenson, by seeking Wang's testimony in an American court, "compel[led] [Wang] to make an unconscionable choice between telling the truth and saving his own life." That premise assumes not only that the March 19, 1988 and April 21, 1988 versions of the heroin delivery (Leung at delivery) were false (if they were true, Wang faced no dilemma between testifying truthfully and receiving leniency), but also that AUSA Swenson knew or should have known they were false.

The Opinion also criticizes INS personnel and alleges that they colluded with AUSA Swenson and other unidentified governmental interests to derail Wang's petition for political asylum.

IV. DISCUSSION OF JUDGE ORRICK'S SPECIFIC FINDINGS OF MISCONDUCT

A. Prior Interrogation Statements

Judge Orrick found that AUSA Swenson ignored "clear indications" that PRC law enforcement officials coerced parts of Wang's testimony. That finding has several components. The issues relating to the videotape of one of Wang's interrogations are discussed below in Sections IV C. and D. The other aspects of the finding are discussed in this Section.

First, Judge Orrick found that AUSA Swenson did not pursue several clear signals that Wang had been interrogated on many

occasions for which AUSA Swenson did not have written minutes. That conclusion is based upon the U.S. prosecution team's receipt in March 1988 of three interrogation statements of Wang. The "minutes" from the afternoon session on March 19, 1988, contained a statement that "so many interrogations have been conducted on you." AUSA Swenson underlined that phrase in his copy of the statement, but he never asked PRC officials whether they had statements from those "many" interrogation sessions. Indeed, AUSA Swenson testified that "it did not even occur to [me]" to inquire about additional statements. AUSA Swenson did, however, specifically ask other members of the prosecution team to request from the PRC all written and videotaped statements of witnesses. An AUSA is entitled to rely on the good faith efforts and representations of case investigators concerning their discovery efforts. When AUSA Swenson learned of the additional statements he took immediate action to have them produced by the PRC police. Accordingly, OPR concluded that AUSA Swenson did not intentionally seek to deny discoverable material to the defense.

Second, Judge Orrick criticized AUSA Swenson for never asking Wang or PRC officials whether Wang had been mistreated in prison or coerced into confessing. AUSA Swenson explained that Wang appeared to be in good health and to have a friendly relationship with the PRC officials. Given the lack of evidence that Wang had been mistreated, AUSA Swenson concluded that questions about prison conditions would have been rude. He concluded further that Wang's March 19, 1988 statement (Leung at scene of heroin delivery) was

amply supported by documentary and testimonial evidence. The McNair memorandum, however, clearly called into question AUSA Swenson's assumptions regarding Wang's treatment. After reading the McNair memorandum, AUSA Swenson should have addressed the mistreatment issue. OPR determined that AUSA Swenson's failure to do so reflected poor judgment.

B. The Delay in Transferring Wang to the PRC Court System

Judge Orrick faulted "the prosecution team" for endangering Wang by seeking to prevent the PRC from transferring Wang to the Chinese court system. The logic of that charge is as follows: 1) a Chinese court would have treated Wang leniently because he cooperated with PRC criminal investigators; 2) Wang was not transferred from the public security units to the court system because AUSA Swenson wanted to use him as a witness in the Leung prosecution; and 3) Wang's recantation of his testimony and his petition for political asylum have now exposed him to a harsher sentence (death penalty) if he is returned to the PRC.

OPR disagreed with Judge Orrick's analysis. OPR found that there was no evidence that any United States official requested that the PRC delay transferring Wang to the Chinese court system. To the contrary, OPR found that the PRC made a unilateral decision to retain Wang in the custody of the Ministry of Public Security to facilitate cooperation with the U.S. in the Leung prosecution. The PRC had a strong interest in prosecuting Leung and had tried unsuccessfully to persuade Hong Kong to prosecute him. U.S. officials knew that Wang would not be available to testify against

Leung once Wang was transferred to the court system, but they were powerless to prevent a transfer. And while the U.S. did seek Wang's testimony, OPR concluded that such an interest does not give rise to a finding of misconduct.

Judge Orrick's criticism also assumed that AUSA Swenson knew or should have known that Wang's testimony in the Leung case would be false. OPR found that assumption to be unwarranted. AUSA Swenson had ample reason to believe that Wang's March 19, 1988 and April 21, 1988 statements were truthful and that such testimony in the Leung case augured well for leniency when Wang returned to the PRC. Wang's recantation, which stunned everyone, was not reasonably foreseeable, and thus AUSA Swenson cannot be faulted for endangering Wang.

C. McNair Memo / Brady Disclosure

Judge Orrick criticized AUSA Swenson's failure to produce to defense counsel the McNair, Chandler, and Findlay memoranda as a "flagrant Brady violation." Judge Orrick concluded that AUSA Swenson's failure to disclose the memoranda "smacks of deliberately ignoring any evidence that might stand in the way of [a successful prosecution]." (Emphasis in original). OPR concluded that AUSA Swenson did not engage in intentional misconduct but that his failure to disclose the McNair, Chandler, and Findlay memoranda constituted a reckless disregard of his obligation to comply with the Brady doctrine.

As detailed above in Section I C., the McNair memorandum outlines the reasons Hong Kong prosecutors declined to prosecute

Leung on the heroin smuggling charges. One reason was the possibility that Wang's "confessions" may have been coerced. The McNair memorandum states that a "video tape has been supplied [by the PRC] * * * [showing that] a most peculiar posture was adopted by W[ANG] throughout the confession, whereby the whole of his left side and left arm was hidden from the camera, as if his left arm and side may have suffered some injury."

AUSA Swenson explained in his deposition and trial testimony that he did not disclose the McNair memorandum because (1) he thought it was a confidential document akin to a Prosecution Memorandum; (2) Inspector Boucher gave it to him while saying "I shouldn't have this"; and (3) he did not think it contained exculpatory information (though he recognized its impeachment potential). OPR did not find the explanations persuasive.

First, even if portions of the McNair memorandum reflected confidential prosecutorial decision-making, the reference to the videotape and to its depiction of possible injury from coercive interrogations clearly were not confidential. AUSA Swenson could have redacted the confidential aspects of the McNair memorandum and disclosed the information about the videotape. Second, evidence suggesting that the principal witness against the accused was coerced into implicating the accused was plainly relevant to the innocence or guilt of the accused and to the impeachment of the witness as well.

OPR concluded that AUSA Swenson acted recklessly in failing to disclose the McNair, Chandler, and Findlay memoranda -- or, at a

minimum, the relevant contents of them -- to the defense, and in failing to disclose their existence to any other member of the prosecution team, to his supervisors, or to anyone at the Department of Justice.

D. The Videotaped Interrogation

Judge Orrick castigated the prosecution's failure to pursue, obtain, or disclose the videotape referred to in the McNair memorandum. AUSA Swenson did not offer any coherent explanation -- either in his testimony or in his OPR interview -- for his failure to act on his knowledge that a videotape of one of Wang's interrogations was available.^{4/} The videotape clearly constituted a prior statement that should have been produced to the defense. OPR concluded that AUSA Swenson acted in reckless disregard of his Rule 16 and Brady obligations to pursue the videotape after he read the McNair memorandum.

E. Preparation of PRC Officials for Cross-Examination

Judge Orrick criticized AUSA Swenson for not preparing the PRC officials adequately with respect to the cross-examination questions they and Wang could expect to face. Judge Orrick noted specifically that AUSA Swenson did not "raise the issues of

^{4/} AUSA Swenson testified that he thought the reference to a videotaped interrogation referred to a videotape of his own interview of Wang on May 19, 1988, in Shanghai. OPR agreed with Judge Orrick that this explanation is "implausible." The McNair memorandum is dated March 28, 1988; consequently, the videotape mentioned could not possibly refer to an interview that did not occur until three months later.

coercion or mistreatment." OPR determined that this charge was unsubstantiated.

On March 8, 1989, during his second trip to Shanghai, AUSA Swenson informed Wang and PRC officials that the defense would ask Wang about his post-arrest treatment and about his prison conditions. AUSA Swenson cautioned them further that defense counsel would probe the inconsistencies in Wang's interrogation minutes. On April 3, 1989, AUSA Swenson supplemented his verbal preparation by sending the PRC officials a written list of questions they could anticipate from defense counsel. That list included an explicit warning that "Mr. Zhu will be extensively cross-examined regarding the treatment given to Wang Zong-Xiao [and] any promises or threats given to him."

F. The Decision Not to Advise the PRC that Wang Could Apply for Asylum

Judge Orrick condemned the Department of State for not warning PRC officials that Wang might apply for asylum. He asserted that the PRC would have been less likely to cooperate with the United States in the Leung prosecution if they had known Wang could apply for asylum and that the harsher penalty Wang may face if he is now returned to China is attributable to "the Americans."

OPR concluded that this charge in so far as it relates to AUSA Swenson, is unsubstantiated. Uncontradicted testimony established that neither AUSA Swenson nor any other Department of Justice employee had any role in the Department of State's decision not to warn the PRC about the possibility of an asylum petition.

G. AUSA Swenson's Alleged Misrepresentations to the Court

Judge Orrick censured AUSA Swenson's "shocking misconduct" with respect to "numerous misrepresentations" made to the court during the discovery and trial in the Leung prosecution.

First, Judge Orrick found that AUSA Swenson falsely stated to the court on March 3, 1989, that he would make a "good faith effort to inquire" of PRC officials whether there existed any videotape recordings of the statements made by PRC witnesses, including Wang. Two weeks earlier, AUSA Swenson had asked CA [redacted] to obtain from the PRC "any other written, or tape-recorded (including videotapes), interrogation or interviews of the defendant witnesses." On March 1, 1989, the DEA asked the American Embassy in Beijing to impress upon PRC officials the need to provide all written, taped, or videotaped records of interrogations or interviews. Thus, on March 3, 1989, AUSA Swenson had reason to believe that diligent efforts were underway to obtain all [redacted] statements, both written and videotaped, of all PRC witnesses. Accordingly, OPR found no misconduct in his March 3, 1989 representation to the court. b7c

Second, Judge Orrick cited a Declaration dated May 14, 1992, in which AUSA Swenson swore to the court as follows:

I had at no time any information or any suggestion * * * that Wang Zong-Xiao had been mistreated at any time after his arrest in Shanghai in March of 1988. Furthermore, neither myself nor any agents had any knowledge or suggestion that any of Wang Zong-Xiao's statements made to law enforcement officials in the [PRC] * * * were, in any way, coerced or brought about through any beatings or torture.

Judge Orrick found that statement to be false, noting that SA mentioned to AUSA Swenson the possibility that "unconventional interrogation techniques" were used to secure Wang's statements. OPR agreed that AUSA Swenson's declaration is inaccurate in two respects. AUSA Swenson acknowledged that before his first trip to Shanghai in May, 1988, he discussed with SA the possibility that PRC law enforcement officials employed coercion to get Wang's interrogation statements. OPR concluded that the discussion with SA constituted a "suggestion" of mistreatment.

Third, the discussion above in Section IV A., C., and D., belies various representations AUSA Swenson made to the court regarding the prosecution's compliance with its discovery obligations. See, e.g., Trial Exhibit 260 at 2:23 - 3:7 ("[T]he United States is doing everything humanly possible to provide defendants' counsel with any information at all relevant to this case, including witnesses and documents"); Trial Exhibit 306 at 1:23-25 ("[T]here does not exist, to the knowledge of the United States, any 'Brady' material that has not already been provided to defendants' counsel").

Fourth, AUSA Swenson stated to the court: "I don't know about any video" despite having read the McNair memorandum's reference to the videotaped interrogation. AUSA Swenson asserts that he filed the McNair memorandum in March, 1989, and that he had forgotten its contents when he made the above-quoted representation to the court on January 29, 1990. Given the size and complexity of the Leung prosecution, and given the fact that AUSA Swenson was the only prosecutor working on the case, OPR concluded that AUSA Swenson's explanation was plausible and that his misrepresentation to the court was reckless rather than intentional.

OPR concluded that AUSA Swenson acted in reckless disregard of his obligation to be candid to the court in all four of the above-detailed instances.

H. AUSA Swenson's Alleged "Cover Up"

Judge Orrick charged that AUSA Swenson engaged in a "series of events" designed to "cover up" his "folly" of trying to use Wang as a witness. OPR concluded that this allegation is unsubstantiated.

Judge Orrick faulted AUSA Swenson for directing the Marshal's Service to bring Wang to his office on January 30, 1990, shortly after the court adjourned the trial to appoint counsel for Wang. Wang had been in the custody of the Marshal's Service since his arrival in the United States on December 27, 1989. Since that time AUSA Swenson had interviewed Wang in his office on several occasions. Accordingly, OPR did not agree that it was a "clear violation of the Court's order" for AUSA Swenson to have the Marshal's Service bring Wang to his office.

Judge Orrick next found that AUSA Swenson erred by telling Wang at the January 30, 1990 meeting, "I am your lawyer." As discussed in Section II E., above, OPR found that AUSA Swenson did not make such a representation. Rather, AUSA Swenson stated to Wang that a court-appointed attorney would not be able to address the only issue Wang had raised, namely, lenient treatment from the PRC courts. AUSA Swenson also stated that he was in a better position to intercede with PRC authorities on Wang's behalf. Both of those representations to Wang were true. Neither implied that AUSA Swenson was Wang's counsel.

Judge Orrick also chided AUSA Swenson for meeting with Wang on February 6, 1990, outside of the presence of Wang's counsel. OPR found that charge to be unsubstantiated. Judge Orrick himself authorized AUSA Swenson to ask Wang for a private meeting. AUSA Swenson asked Wang if he was willing to discuss the case outside the presence of his counsel and Wang responded affirmatively; those facts do not support a charge of misconduct.

Judge Orrick blamed AUSA Swenson for "rebuking [Leung's counsel's] attempt to secure the presence of Yuan and Wang Qianrong for the remainder of the Goldfish trial." OPR found that charge to be unsubstantiated for two reasons. First, as the court itself ruled, AUSA Swenson had no power to prohibit the two PRC officials from leaving the United States. See 944 F.2d at 645. Second, AUSA Swenson acted in good faith when he told Leung's counsel on February 9, 1990, that he believed the two PRC officials had already departed. The Chinese Consulate had given that information

to AUSA Swenson and he had no reason to doubt it. The fact that AUSA Swenson called the Consulate two days later to confirm the two officials' departure and was then told that they had not left until that same morning does not support an inference of hindrance.^{5/}

Judge Orrick found that AUSA Swenson attempted to "interfere with Wang's asylum proceedings." OPR concluded that this charge was unsubstantiated. AUSA Swenson's communications with INS officials, detailed above in Section II G., were not improper. OPR found that AUSA Swenson's reference to 18 U.S.C. § 3508 did not reflect "an obvious attempt to find a means for short-circuiting" Wang's asylum petition, but rather reflected his erroneous belief that Section 3508 might apply to the situation. OPR concluded that there was nothing improper in discussing the possible applicability of Section 3508 with other executive branch officials.

I. INS Processing of Wang's Petition for Political Asylum

Judge Orrick concluded that the INS tried to "railroad Wang's asylum application." OPR found no support for that conclusion.

OPR determined that there was nothing improper in AUSA Swenson's communications with either : or It was entirely appropriate for AUSA Swenson to ascertain the status of the asylum petition and to inform the INS, in response to questioning, that Wang was a witness/defendant in a heroin smuggling conspiracy. That information was clearly relevant to the

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^{5/} Moreover, the Ninth Circuit expressly rejected the defendants' attempt to blame AUSA Swenson for the PRC officials' departure. United States v. Leung Tak Lun, 944 F.2d at 645.

b7C

- 42 -

asylum petition because criminal aliens were ineligible for asylum.^{6/}

OPR found that Judge Orrick's statement that several INS personnel, including District Director [redacted], were present at a second interview of Wang on March 27, 1990, was incorrect. OPR found further that the contingent suggestion that such top-level involvement in processing Wang's application bespoke political interference falls with the erroneous premise.

Judge Orrick's assertion that the INS engaged in judge-shopping to have the allegedly pro-government Judge Bette Stockton handle Wang's petition is also unsubstantiated. Judge Orrick inferred from a telephone call made by INS District Counsel

to an Executive Office for Immigration Review (EOIR) manager that attempts were made to time the charging documents in the exclusion proceeding to ensure that the case was assigned to Judge Stockton. [redacted] asked the EOIR officer about the hearing date that would be assigned because he had to coordinate with the Marshals Service to ensure Wang's presence at the hearing. OPR found nothing untoward in that necessary communication.

V. CONCLUSIONS OF THE OFFICE OF PROFESSIONAL RESPONSIBILITY

For the reasons expressed in Section IV C., D., and G., OPR concluded that AUSA Swenson acted with a reckless disregard of his

^{6/} Judge Orrick took umbrage at the Department of State cable noting that the INS was "confident" Wang's petition would be denied. That confidence, appropriately expressed to the governmental body responsible for handling foreign relations, was based on the law that made criminal aliens ineligible for asylum. OPR found nothing improper in the communication or the prediction.

- 43 -

obligations as a prosecutor and as an officer of the court on several occasions in the Leung investigation and prosecution. OPR concluded that the remainder of Judge Orrick's criticisms of AUSA Swenson were unsubstantiated.

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